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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 86-1077, 7099

UNIVERSAL CITY STUDIOS, INC.,
Plaintiff-Appellant,
Cross-Appellee,

v.

NINTENDO CO., LTD. and NINTENDO OF
AMERICA, INC.,

Defendants-Appellees,
Cross-Appellants.

AFFIDAVIT



STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

AFFIDAVIT IN OPPOSITION TO MOTION OF UNIVERSAL
CITY STUDIOS, INC. TO SELECT A PANEL FOR THE
HEARING OF THIS APPEAL

JOHN J. KIRBY, JR., being duly sworn, deposes and says:

1. I am a member of the firm Mudge Rose Guthrie Alexander & Ferdon, attorneys for appellees/cross-appellants, Nintendo Co. Ltd. and Nintendo of America Inc. ("Nintendo"). I submit this affidavit in response to the motion of appellant/cross-appellee, Universal City Studios, Inc. ("Universal"), to select a particular panel for the hearing of this appeal.

2. Nintendo, obviously, has no objection to either Judge Meskill or Judge Kearse, or both, being designated as members of the panel to consider this appeal. Nintendo did not consent to Universal's motion because the motion is premised on a mischaracterization of the issues raised by the appeal and the holding of Judge Sweet below. Under these circumstances, Nintendo did not want to be associated with any attempt to interfere with this Court's normal process of panel designation.

3. Without attempting to detail the full extent of our disagreement with the alleged basis for Universal's motion, which is fully covered in Nintendo's brief filed with this Court on April 10, 1986, it is respectfully suggested that it is frivolous to assert that this Court, on this appeal, is required to review a decision of a California federal court rendered 10 years ago in a case which was concluded over five years ago. Moreover, the decision of Judge Sweet, from which Universal now appeals, rests on independent findings of bad faith which were not the subject of its earlier appeal.

4. This Court is in the best position to determine whether Universal's attempt to re-raise certain issues on this appeal, which were not reached by the panel which affirmed Judge Sweet's summary judgment determination almost two years ago, suggests that Judges

Kearse and Meskill should serve on the panel hearing the current appeal.

John J. Kirby, Jr.
JOHN J. KIRBY, JR.

Sworn to before me this
22nd day of April, 1986

Dorothy P. Dybing
Notary Public

DOROTHY P. DYBING
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-4102846
Public in New York County
Certificate filed in New York County
Commission Expires March 30, 1987

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on April 22, 1986 a true copy of the Affidavit in Opposition to Motion of Universal City Studios, Inc. to Select a Panel for the Hearing of This Appeal was served by hand upon Wachtell, Lipton, Rosen & Katz, 299 Park Avenue, New York, New York 10171, attorneys for Plaintiff-Appellant, Cross-Appellee, Universal City Studios, Inc.

Dated: New York, New York
April 22, 1986


Phyllis H. Clements